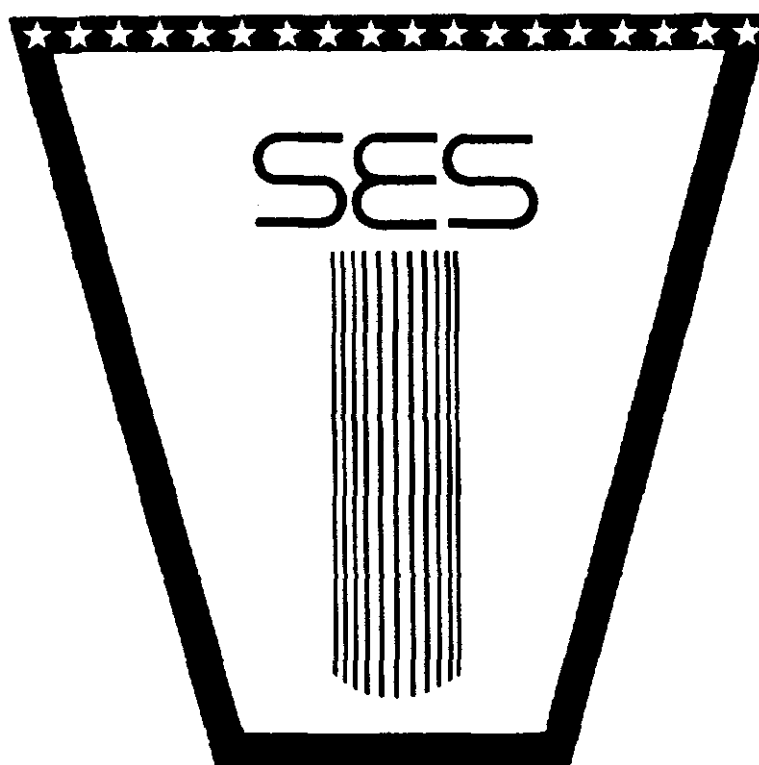




OFFICE OF THE SECRETARY OF DEFENSE

SENIOR EXECUTIVE SERVICE

Disciplinary Actions and Removals



Office of the Secretary of Defense, OSD Field Activities,
Organization of the Joint Chiefs of Staff, the U.S. Court of
Military Appeals, the U.S. Mission to NATO, and the Defense Agencies

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SENIOR EXECUTIVE SERVICE
DISCIPLINARY ACTIONS AND REMOVALS

Senior Executive Service Handbook

Chapter 9



COMPTROLLER

(Administration)

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

DoD 1402.3-H
Chapter 9

FOREWORD

The Senior Executive Service Handbook is issued under the authority of DoD Directive 1402.3, "Administration of the Senior Executive Service Program in the Office of the Secretary of Defense and the Defense Agencies," August 16, 1984.

This chapter deals with the removal of Senior Executive Service (**SES**) members (other than those serving a probationary period) for inadequate executive performance or misconduct. It also covers the removal of **noncareer**, limited term, and limited emergency appointees. Removal during the probationary period is covered in Chapter 8.

This chapter applies to the Office of the Secretary of Defense (OSD), DoD field activities, the Organization of the Joint Chiefs of Staff (**OJCS**), the Defense Agencies (except the National Security Agency/Central Security Service and the Defense Intelligence Agency), the Office of the Inspector General (**OIG**), the U.S. Court of Military Appeals (USCOMA), and the U.S. Mission to the North Atlantic Treaty Organization (NATO).

This chapter is effective immediately, and its use is mandatory.

Send recommended changes to this chapter through channels to the following:

SES and Classification Division
Directorate for Personnel and Security
Washington Headquarters Services
Rm 3B347, The Pentagon
Washington, D.C. 20301-1155

Copies may be obtained from OSD Publications, Room 3B960, The Pentagon.

D. O. Cooke
Deputy Assistant Secretary of Defense

REFERENCES

- (a) **Title 5**, United States Code, Section 1206
- (b) Title 5, United States Code, Section 7352
- (c) DoD Directive 1442.2, "Personnel Actions Involving Civilian Attorneys," June 26, 1967
- (d) Title 5, United States Code, Section 3592 (Title 5, Code of Federal Regulations, Part 359, Subparts D, E, and F)
- (e) **Title 5, United States Code**, Section 8336(h)
- (f) Title 5, United States Code, Section 3594 (Title 5, Code of Federal Regulations, Section 359.702)
- (g) 'Title **5**, United States **Code**, Section 7701
- (h) Administrative Instruction No. 9, "Processing Complaints of Discrimination," January **11, 1979**
- (i) Title 5, United States Code, Section 7511
- (j) Title 5, Code of Federal Regulations, Section **317.605(d)**
- (k) Title 5, United States Code, Section 7543 (Title 5, Code of Federal Regulations, Part 752, Subpart F)
- (l) Administrative Instruction No. 8, "Disciplinary and Adverse Actions," August 17', 1981
- (m) Title 5, United States Code, Section 3323(b)
- (n) **Administrative** Instruction No. 37, "Employee Grievances," August **12, 1981**

CHAPTER 9

DISCIPLINARY ACTIONS AND REMOVALSA. GENERAL

1. The statutes governing the Senior Executive Service (**SES**) provide for the removal of executives for a variety of reasons. Some, such as removals for **poor** Performance or misconduct, are personal to the executive. Others, such as reduction in force, derive from organizational, fiscal, or other non-personal causes.

2. The Office of Personnel Management (**OPM**) has regulated removals for performance or misconduct. The procedural protections and **placement rights** to which an SES member may be entitled are determined by the basis for the removal action and the member's appointment status.

3. Removal actions taken in accordance with recommendations of the Special Counsel of the Merit Systems Protection Board (**MSPB**) (5 U.S.C. 1206 (reference **(a)**)) or for national security reasons (5 U.S.C. 7532 (reference **(b)**)) occur infrequently. They are not discussed in this chapter. **If** such an action becomes necessary, information on the procedural and other requirements may be obtained from the servicing personnel office.

4. As required by DoD Directive 1442.2 (reference **(c)**), proposed actions involving SES attorneys must have the approval of the DoD General Counsel/Director, Defense Legal Services Agency (**DLSA**) prior to being processed.

B. DEFINITIONS

1. Adverse (or Disciplinary) Action. The removal from the Federal service or the suspension for more than 14 days of an SES appointee for misconduct, neglect of duty, or malfeasance.

2. Separation For purposes of this chapter, the removal of a limited term or ~~limited term~~ emergency appointee for other than disciplinary reasons.

3. Non-Probationary Career Appointee. An SES career appointee who has ~~completed~~ a one-year SES probationary period or who converted to the SES without being required to serve a probationary period.

4. Summary Rating. Final rating under the performance appraisal plan assigned by the Secretary of Defense (for OSD or the Defense Agencies) or other appointing authority, after considering the recommendations of the Performance Review Board.

5. Agency Collectively, the Office of the Secretary of Defense (**OSD**), DoD field activities, the Organization of the Joint Chiefs of Staff (**OJCS**), the Office of the Inspector General (**OIG**), the U.S. Mission to the North

Atlantic' Treaty Organization (NATO), the U.S. Court of Military Appeals (USCOMA), Defense Advanced Research Projects Agency (DARPA), Defense Audiovisual Agency (DAVA), Defense Security Assistance Agency (DSAA), Defense Legal Services Agency (DLSA), and the Defense Agencies listed below.

6. Defense Agencies

- a. Defense Communications Agency (DCA).
- b. Defense Contract Audit Agency (DCAA).
- c. Defense **Investigative Service (DIS)**.
- d. Defense Logistics Agency (DLA).
- e. Defense Mapping Agency (DMA).
- f. Defense Nuclear Agency (DNA).

7. Employing Organization

- a. **Each of** the six Defense Agencies.
- b. **OSD (includes all other components** listed under "Agency").

C. REMOVAL OF SES CAREER APPOINTEES FOR INADEQUATE EXECUTIVE PERFORMANCE

1. Cause of Action. A career appointee, who is not serving a **probationary period**, may be removed from the SES for unsatisfactory or **minimally satisfactory executive** performance (5 U.S.C. 3592 (5 CFR 359, Subpart E), **reference (d)**). The removal action **must be** predicated upon the appointee's summary rating (or ratings) under the agency performance rating plans. Performance ratings are discussed in Chapter 4.

a. Optional Removal. A career appointee who receives a **summary rating of unsatisfactory** must be **moved out of** his or her position. The **appointee may be** reassigned to another SES position within the agency, removed from the SES and placed in an appropriate non-SES position within the agency, or transferred to an appropriate position in another agency. **The decision on the action to be taken is made by the Secretary of Defense for OSD executives and the "Defense Agency Directors for other executives after consideration of recommendations by the Performance Review Board. (Information on processing reassignments and transfers is included in Chapter 6.)**

b. Mandatory Removal. A career appointee must be removed from the **SES when:**

(1) **The appointee receives two annual summary ratings of unsatisfactory within five consecutive years; or**

(2) The appointee receives **two** annual summary ratings of minimally satisfactory (or one unsatisfactory and one minimally satisfactory) within three consecutive years.

2. Procedures. The employing organization shall notify the career appointee in writing at least 30 calendar days before the effective date of the removal action (5 CFR 359, Subparts D and E, reference (d)). The written notice shall be signed by the Deputy Assistant Secretary of Defense (Administration) (**DASD(A)**) or Defense Agency Director and include the following information:

a. The summary rating or ratings, the performance year (s) covered, and the date(s) when given, which the employing organization is using to support the removal action.

b. The appointee's placement rights and the position to which the appointee will be assigned.

c. **The** appointee's right to request an informal hearing before an **official designated** by the **MSPB**. The request for hearing should be addressed to the Office of the Administrative Law Judge, Office of the Secretary, Merit Systems Protection Board, 1120 Vermont Ave., N. W. Washington, D. C. 20419. It should be made at least 15 days before the effective date of the action.

d. The effective date of the action.

e. When appropriate, a statement on the appointee's eligibility for discontinued service retirement. An appointee who has completed 25 years of service or who is 50 years old and has completed 20 years of service is **eligible** for discontinued service retirement under 5 U.S. C. 8336(h) (reference (e)).

3. Guaranteed Placement

a. **A** non-probationary career appointee who is removed from the SES for inadequate executive performance is entitled to placement in a civil service position (other than an SES position) (see 5 **CFR** 359.702, reference (f)). The placement offer shall meet the following criteria:

(1) The offer must be to a continuing position at the **GS-15 level or above, or equivalent.**

(2) The appointee must meet the qualifications requirements for the position.

(3) **If** at the time of appointment to the SES the individual held a career or career-conditional appointment (or an **appointment** of equivalent tenure, as determined by OPM), then the placement **shall** be to a position of equivalent tenure. This requirement does not apply if the agency does not have positions of equivalent **tenure and/or** the employee is **will ing** to accept an appointment **with** different tenure.

(4) **An** appointee **who** does not meet **the** conditions **in** paragraph C.3.a.(3) may, upon approval of OPM, be placed in a Schedule B position. Questions on use of a Schedule B appointment authority should be addressed to the Director of Personnel and Security (**WHS**).

b. The employing organization taking the removal action shall place the appointee in an appropriate position within the employing organization. As an alternative, the employing organization may arrange for placement in an appropriate position in another organization within the agency, the *Department of Defense*, or in another *agency*. **If** the placement involves a transfer to another agency, the transfer must be acceptable to the appointee and the gaining agency. The placement of the appointee under these provisions shall not cause the separation or reduction in grade of any other employee.

c. An appointee placed under these provisions is entitled to receive basic pay at the highest of the following:

(1) The rate of basic pay in effect for the position in which he or she is being placed,

(2) The rate of basic pay currently in effect for the position the appointee held in the civil service immediately before being appointed to the SES, or

(3) The rate of basic pay in effect for the appointee immediately before his or her removal from the SES.

4. Restriction in Certain Removal Actions. As outlined in 5 CFR 359.502 (reference (d)), the removal of a career appointee who has received two summary ratings of minimally satisfactory (or one unsatisfactory and one minimally satisfactory) within three consecutive years may not be made effective within **120** days after the following:

a. The appointment of a new Secretary of Defense, or

b. The appointment in the employing organization of the career appointee's most immediate supervisor who is a **noncareer** appointee and has the authority to remove the career appointee. For purposes of this restriction, the term "noncareer appointee" is considered to include an SES noncareer or limited appointee, an appointee in a position filled by Schedule C or noncareer executive assignment, or **an** appointee in the Executive Schedule other than a career Executive Schedule position.

5. Appeals

a. The removal of a career appointee under these provisions is not **appealable** to the MSPB under 5 **U.S.C.** 7701 (reference (g)). The informal hearing discussed in paragraph **C.2.(c)** does not constitute an appeal before the MSPB.

b. Allegations of prohibited personnel practices shall be submitted to the Office of the Special Counsel, MSPB.

c. The removal of a career appointee under these provisions is not **grievable** under agency grievance procedures.

d. Complaints alleging discrimination based on race, color, religion, sex, national origin, age, or physical or mental handicap will be processed in accordance with agency procedures. In the case of employees' **assigned to** agencies listed in paragraph B.5. (less DLSA), **see** Administrative Instruction No. 9 (reference (h)). DLSA employees will follow procedures of the agency on whose roles they are placed.

D. REMOVAL OR SUSPENSION FOR MORE THAN 14 DAYS OF AN SES CAREER APPOINTEE FOR MISCONDUCT, NEGLIGENCE OF DUTY, MALFEASANCE, OR FAILURE TO ACCEPT A DIRECTED ASSIGNMENT OR TO ACCOMPANY A SITUATION IN A TRANSFER OF FUNCTION

1. Coverage

a. The provisions of this section apply to career appointees who are not serving a probationary period, to those probationers who meet the definition of "employee" in 5 U.S.C. 7511 (reference (i)), and to limited term or limited emergency appointees who meet the conditions in 5 CFR 317.605(d) (reference (j)) and the definition of "employee" in reference (i).

b. This section covers removals from the Federal service or suspension for more than 14 days for misconduct, neglect of duty, or malfeasance under 5 CFR 752, Subpart F (reference (k)). Appointees who fail to accept a reassignment or to accompany a transfer of functions **shall** be **removed** under these provisions.

c. At times, it may be appropriate to treat unacceptable performance as a disciplinary matter. This would pertain when the performance deficiencies result from intentional wrongdoing by the appointee. Under these circumstances, the employing organization should follow the adverse action procedures discussed in this section. The cause of action would be the specific act (or acts) of wrongdoing. **If**, however, the performance deficiencies stem from a lack of technical knowledge or managerial competency, then the employing organization should take action in accordance with the provisions outlined in Section C of this chapter.

d. In practically **all** instances, disciplinary or adverse action will be based upon the appointee's misconduct, neglect of duty, or malfeasance while in official duty status. However, off-duty actions or misconduct might provide a valid basis for adverse action when it can be demonstrated that the appointee's ability to discharge the responsibilities of his or her SES position has been seriously diminished by the off-duty actions or misconduct. Because of the sensitivity of such cases, the issue of a demonstrable causal relationship between the off-duty misconduct and the appointee's ability to discharge his or her official responsibilities should be discussed with the servicing personnel office and the Office of the General Counsel before an adverse action is initiated.

e. There are two major differences between disciplinary actions involving SES members and those involving other civilian employees. **F i r s t** , the cause of action standard (applicable to the SES) is the more restricted

one of "misconduct, neglect of duty, or malfeasance. " Second, the penalties sanctioned by the law are: (1) removal from the Federal service or (2) suspension for more than 14 days (5 CFR 752, Subpart F, reference (k)). Oral admonishments and formal reprimands are **also permissible** under administrative action. Penalties not appropriate as a disciplinary action against an SES member are: (1) assignment to a position outside the SES, (2) a short suspension for 14 days or less, or (3) a reduction in SES pay level. These restrictions modify the application of the table of penalties in Administrative Instruction No. 8 (reference (1)) to actions involving SES members assigned to organizations listed in subsection B.5.

f. The procedural requirements governing adverse actions permit the agency to mitigate the penalty proposed in the advance notice. However, the agency cannot decide to impose a penalty more severe than the action proposed in the advance notice. The restrictions discussed in the preceding paragraph apply to the penalty actually imposed as well as the proposed penalty.

2. Procedures

a. The employing organization **shall** give the career appointee a written notice at least 30 days in advance of the proposed removal or suspension of more than 14 days (reference (k)). The notice shall be signed by an official of the agency who has the authority to remove or to **recommend** the removal of the appointee and must be coordinated in advance with the Director for Personnel and Security (**WHS**) or the appropriate Defense Agency Director of Personnel . It shall include the following information:

(1) The specific reasons for the proposed removal.

(2) The appointee's right to review the material being used to support the charges. (This material must be made available for review by the appointee, his or her representative or, if a medical issue is involved, the appointee's designated **physician**.)

(3) The appointee's right to reply orally and in writing and to furnish affidavits and other documentary evidence; the name of the agency official authorized to hear the oral reply; and the time **limits**, generally not later than ten days, for making oral or written reply. (The official designated to hear the oral reply must have authority either to make or to **recommend** a final decision on the proposed action.)

(4) The appointee's right to be represented by an attorney or other representative.

b. Exceptions

(1) The 30-days advance written notice is not required for placing a career appointee in a nonduty status with pay during the notice period for removal or for suspension for more than 14 days when (reference (k)):

(a) There is reason to believe that the employee has committed a crime for which a sentence of imprisonment can be imposed, or

(b) **The circumstances are** such that retention of the appointee:

1 may be injurious to the appointee, his or her fellow workers, or the general public;

2 may result in damage to government property; or

3 may, because of the nature of the appointee's offense, reflect unfavorably on the public perception of the Federal service.

(2) **In** instances outlined in paragraphs **D.2.b.** (1)(a) and (b) above, the agency:

(a) Shall include in the notice the reasons for not retaining the appointee in an active duty status during the notice period.

(b) May require the appointee to furnish any answer to the proposed action and affidavits and other documentary evidence in support of the answer within such time as would be reasonable under the circumstances, but not less than seven days.

(c) May, when circumstances require immediate action, place the appointee in a nonduty status with pay for such time, not to exceed ten days.

c. The appointee shall be given a notice of decision and specific reasons therefore signed by an executive at a level higher than the proposing official **unless** the proposing official is the Secretary of Defense or Defense Agency Director. The notice must be coordinated in advance with the Director for Personnel and Security (**WHS**) or the appropriate Defense Agency Personnel Officer.

d. The notice of decision shall include the following:

(1) The action to be taken, the reasons for the agency's decision, and the effective date of the action.

(2) The appointee's right of appeal to the **MSPB**. The appeal should be made to the appropriate MSPB Regional Office not later than 20 days after the effective date.

(3) When warranted, a less severe penalty may be substituted for the proposed removal. The substitute penalty may be a suspension for more than 14 days or an official reprimand. A statement of the agency's decision to mitigate the penalty and the action being taken should be included in the notice of decision. The penalty imposed may not be more severe than the action proposed in the advance notice.

e. The final notice shall be delivered to the appointee on or before the effective date of the action.

3. Appeals

a. The removal of a career appointee under these provisions is appealable to the MSPB in accordance with 5 **U.S.C.** 7701 (reference (g)).

b. Allegations of prohibited personnel practices shall be **submitted** to the Office of the Special Counsel, **MSPB**.

c. The removal of a career appointee under these provisions is not **grievable** under agency grievance procedures.

d. Complaints alleging discrimination based on race, color, religion, sex, national origin, age, or physical or mental handicap will be processed in accordance with Administrative Instruction No. 9 (reference (h)).

4. Time Restriction. The removal of a career appointee under these provisions may be made effective without regard to the moratorium restrictions which apply to removals for inadequate executive performance.

5. Placement. A career appointee removed from the SES under these provisions is **not** entitled to placement in a position outside the SES.

6. Note. Although failure to accept a directed reassignment to a **position outside** the commuting area or to accompany a position in a transfer of function outside the commuting area is considered grounds for suspension or removal from the **civil** service, it shall not be considered as a removal for cause on charges of misconduct or delinquency (i.e., eligibility for an annuity based upon involuntary separation is not jeopardized).

E. REMOVAL OF SES NONCAREER, LIMITED TERM, OR LIMITED EMERGENCY APPOINTEES; REMOVAL OF REEMPLOYED **ANNUITANTS**

1. Removal

a. Except as provided in paragraph **E.1.b.**, a **noncareer**, limited term, or limited emergency appointee may be removed from the SES at any time (5 **U.S.C.** 7352 and 3592, references (b) and (d)).

b. The removal for misconduct of a limited term or limited emergency appointee who meets the conditions set forth in **D.1.a.** is subject to the requirements in Section D.

c. **A** reemployed **annuitant** serves at the pleasure of the appointing authority and may be removed from the SES at any time. (See 5 **U.S.C.** 3323(b), reference (m).)

2. Mandatory Action

a. A limited term or limited emergency appointee must be separated upon the expiration date of the limited appointment or when the appointee

has served the maximum period of service permitted under 1 aw. As conditions warrant, a limited term or **limited** emergency appointee may be separated prior to the expiration date of the limited appointment.

b. A limited term or limited **emergency** appointee **may** not continue to hold a position under such appointment **if within** the preceding 48 months, the appointee has served 36 months **in** the aggregate under any combination of limited term or limited emergency appointments.

c. A separation under the above conditions would be a nondisciplinary action.

3. Procedures

a. The employing organization shall give the appointee a written notice at least one day prior to the effective date of the removal action. The notice must show the effective date. The notice, signed by the **DASD(A)** or Defense Agency Director, need not include a statement of the reasons for the action.

b. The notice to a limited term or limited emergency appointee who has a placement provided by 5 CFR **317.605(d)** (reference (j)) **shall** specify the position to which the appointee will be assigned.

4. Placement

a. Except as provided in paragraph **E.4.b.**, an appointee removed or terminated under these provisions is not entitled to placement in a position outside the SES.

b. A limited term or limited emergency appointee who meets the conditions contained in reference (j) is entitled to be placed in the position he or she held immediately prior to the limited appointment or in a position of like tenure, status, and grade.

5. Appeals

a. The removal of an appointee under these provisions is not appealable to the MSPB under the provisions of 5 **U.S.C.** 7701 (reference (9)).

b. Allegations of prohibited personnel practices shall be submitted to the Office of the Special Counsel, **MSPB**.

c. The removal of an appointee under these provisions may be grieved under agency grievance procedures. (See Administrative Instruction No. 37, reference (n).)

d. Complaints alleging discrimination based on race, color, religion, sex, national origin, age, or physical or mental handicap

will be processed in accordance with Administrative Instruction No. 9 (reference (h)).

6. Time Restriction. A removal under these provisions is not subject to the moratorium restriction discussed in Section C.